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No. 09-195

Supreme Court, U.S.
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In The
Supreme Court of the United States

DAN REUST,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Alaska

RESPONDENT'S BRIEF IN OPPOSITION

DANIEL S. SULLIVAN
Attorney General
STATE OF ALASKA

JONATHAN WOODMAN
Counsel of Record
Assistant Attorney General

RUTH BOTSTEIN
Assistant Attorney General
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Phone: (907) 269-5190

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does Alaska Statute 09.17.020(j), which provides that 50% of all punitive damages awards shall be allocated to the State's general fund, violate the Takings Clause of the United States Constitution?

2. Does Alaska's punitive damages allocation statute, as applied to appellant Dan Reust, violate the Due Process Clause?

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STATEMENT OF THE CASE

Appellant Dan Reust filed suit in Alaska state court against his former employer, alleging wrongful discharge. (Pet. App. 14). The jury awarded him compensatory and punitive damages. (Pet. App. 15). After post-trial motion practice, the trial court reduced the amount of punitive damages to $500,000 in accordance with state law. (Pet. App. 16). The trial court also granted the State of Alaska's motion to intervene in the case and, after briefing and argument, allocated 50% of the reduced punitive damages award to the State of Alaska in accordance with AS 09.17.020(j). (Pet. App. 15-16). This statute provides that "[i]f a person receives an award of punitive damages, the court shall require that 50% of the award be deposited into the general fund of the state." (Pet. App. 70). The court issued final judgment awarding Reust $500,000 in punitive damages, 50% of which was allocated to the State of Alaska. (Pet. App. 16).

Reust appealed to the Alaska Supreme Court. On appeal, he argued that AS 09.17.020(j)'s allocation of 50% of punitive damages awards to the State violated the Due Process and Takings Clauses of the United States Constitution. (Pet. App. 44-54). The Alaska Supreme Court issued a published opinion, *Reust v. Alaska Petroleum Contractors*, 127 P.3d 807 (Alaska 2005), which appears at Pet. App. 12-61. The court rejected Reust's constitutional arguments, holding that the 50% allocation provision neither violated the

Due Process Clause nor constituted an unconstitutional taking. (Pet. App. 44-54). The court identified legal flaws in the jury's award of damages for lost wages, however. It remanded the case for recalculation of compensatory and punitive damages and instructed the trial court to review the recalculated punitive damages award for excessiveness under federal and state due process law. (Pet. App. 55-57, 60).

On remand, Reust and APC entered into a contractual agreement purporting to settle the case. (Pet. App. 3-4, 75-82). The State of Alaska was not a signatory to the Reust/APC agreement and did not agree to its terms. (Pet. App. 3-4, 75-82). The agreement did not provide for any payments to the State of Alaska in satisfaction of its interests under AS 09.17.020(j). (Pet. App. 3-4, 75-82). But in the agreement, Reust expressly acknowledged the risk that the State might be owed money as a result of the jury's punitive damages award and assumed all responsibility for making any payments to the State: The agreement provides that "Dan Reust assumes all risk that the State of Alaska has an enforceable claim for punitive damages in this case pursuant to AS 09.17.020(j). . . . it shall be the sole responsibility of Dan Reust to pay any sum" owed to the State. (Pet. App. 77). Reust and APC asked the trial court to dismiss the lawsuit based on the settlement agreement, but the trial court refused. (Pet. App. 3-5). It reiterated that AS 09.17.020(j) gave the State a protectable interest in 50% of the punitive damages

award. The court determined that the State's interest arose when the jury awarded punitive damages; that the State's interest survived the appellate proceedings; and that it would be inequitable and would frustrate the legislature's purpose to permit the litigation to be dismissed over the State's objection. (Pet. App. 4). Instead, the trial court followed the appellate court's directions for recalculation of the amount of punitive damages in the case, calculated the proper amount, and explained why the recalculated amount was not constitutionally excessive. (Pet. App. 4-5). The court adjusted for attorney fees, then again entered final judgment in the State's favor for 50% of the recalculated punitive damages award. (Pet. App. 4-5).

Reust appealed again to the Alaska Supreme Court, which issued a second published opinion, *Reust v. Alaska Petroleum Contractors*, 206 P.3d 437 (Alaska 2009), which appears at Pet. App. 1-11. The Alaska court again upheld the constitutionality of AS 09.17.020(j). It clarified that the State's interest in its statutory share of the punitive damages award comes into being when the jury issues its punitive damages verdict, not after a final judgment is issued. (Pet. App. 5-9). Since Reust was not granted a new trial, the court found that the first appeal and remand did not eliminate the State's statutory interest in 50% of the punitive damages he was awarded. (Pet. App. 8-9). The court determined that additional adjustments to the punitive damages award should be made to account for litigation costs and post-judgment

interest, and it once again remanded the case for modification of the judgment. (Pet. App. 11). No final judgment has been entered.

Reust now petitions for certiorari.

ARGUMENT

No compelling reason exists for this court to review the Alaska court's determination that Alaska Statute 09.17.020(j) is constitutional. There is no split of authority among the lower federal courts or among state courts, and the Alaska Supreme Court's constitutional analysis is sound. While the constitutionality of Alaska's punitive damages statute is of importance to Alaskans, it has little import on a national scale. Indeed, this court in 2008 denied certiorari on the identical question Reust raises here. *See Engquist v. Oregon Dep't of Agric.*, 478 F.3d 985, 1001-04 (9th Cir. 2007), *cert. granted in part and denied in part*, 128 S. Ct. 977 (2008), *and aff'd*, 128 S. Ct. 2146 (2008).

A. There Is No Split Of Authority Regarding The Constitutionality Of Split-Recovery Statutes Like Alaska's Under The Takings Clause.

There is no split of authority here. Reust asserts that "State courts are sharply divided" over whether split-recovery punitive damages statutes violate the Fifth Amendment's prohibition on the taking of private property for public use without just compensation, but he is wrong. (Pet. 8). Reust's analysis

misses a crucial, dispositive factor. He lumps together all state statutes that split punitive damages awards or judgments between the recovering party and state governments, referring to them generally as "split-recovery statutes." But the laws of different states are not identical. The only punitive damages allocation statutes found to be unconstitutional takings provided that the state's interest in the punitive damages judgment vested only after a final judgment was issued and the money was actually paid out to the recovering party. In contrast, Alaska's interest under AS 09.17.020(j) vests when the jury issues its verdict, but before final judgment is entered and before any money changes hands. Like other courts considering statutes with this framework, the Alaska Supreme Court correctly found that no taking took place because litigants have no vested property interest in an unrealized punitive damages award that is limited by state law.

Alaska Statute 09.17.020(j) creates a state interest in 50% of a punitive damages award, adjusted for costs and attorney fees. (Pet. App. 5-11, 70). The State's interest under the statute attaches when the jury issues its verdict, but before any final judgment is entered. (Pet. App. 5-8). Courts that have examined statutes textually similar to Alaska's under a takings clause analysis have agreed that they do not represent an unconstitutional taking of private property without just compensation. The state courts of last resort in six states, and one federal Circuit Court of Appeals, all have reached this conclusion. *See*

Engquist v. Oregon Dep't of Agric., 478 F.3d 985, 1001-04 (9th Cir. 2007), *cert. granted in part and denied in part*, 128 S. Ct. 977 (2008) (denying certiorari on the constitutionality of Oregon's split-recovery punitive damages statute) *and aff'd*, 128 S. Ct. 2146 (2008); *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1058 (Alaska 2002) (plurality opinion); *Gordon v. State*, 608 So. 2d 800, 801-02 (Fla. 1992); *Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635, 639 (Ga. 1993); *Cheatham v. Pohle*, 789 N.E.2d 467, 472-75 (Ind. 2003); *Shepherd Components, Inc. v. Brice Petrides-Donahue & Assocs.*, 473 N.W.2d 612, 619 (Iowa 1991); *Fust v. Attorney Gen'l of Missouri*, 947 S.W.2d 424, 431 (Mo. 1997) (en banc).

Reust focuses on the two contrary decisions from the state courts in Colorado and Utah. (Pet. 8-12 (citing *Kirk v. Denver Publ'g Co.*, 818 P.2d 262, 266-73 (Colo. 1991) (en banc) and *Smith v. Price Dev. Co.*, 125 P.3d 945, 949-53 (Utah 2005))). But the statutes considered there were materially different from Alaska's, an issue Reust ignores. In particular, Reust relies on the Colorado Supreme Court's opinion in *Kirk v. Denver Publ'g Co.*, 818 P.2d 262, 266-73 (Colo. 1991) (en banc). There, the Colorado Supreme Court invalidated a statute providing that Colorado was entitled to receive one-third of punitive damages awards that were "collected" by the injured party. *Kirk*, 818 P.2d at 266; *see also* Pet. App. 73-74 (text of Colorado statute). The court found this to be an unconstitutional taking, in large part because the injured party's interest in recovery "ripened into a

judgment" and was recovered before Colorado's statutory interest became cognizable. *Id.* at 268. Colorado's statute was constitutionally infirm because it was drafted so that the state's statutory interest was in monies already recovered by the injured party, not in a percentage of a court award that had not yet been reduced to judgment and paid: "The state's asserted interest is not in the judgment itself but in the monies collected on the judgment, and that interest arises only at a point in time after the judgment creditor's property interest in the judgment has vested." *Id.* at 272. The Utah Supreme Court reached the same conclusion when faced with a Utah law that permitted the state to seize a share of punitive damages awards only after they were "paid" to the litigant. The statute was an unconstitutional taking because it "gave the State no interest in the judgment itself. Rather, it gave the State an interest only in the monetary *proceeds* of the Smiths' judgment, an interest that first arose when the judgment was satisfied." *Smith*, 125 P.3d at 951. The outcome of the Colorado and Utah courts thus depended on the fact that the state's statutory interest became cognizable only after final judgment was issued and money changed hands.

Alaska's statute is different. Under AS 09.17.020(j), the state's statutory interest is in a punitive damages "award," not in the proceeds of a punitive damages judgment. The Alaska Supreme Court specifically addressed this issue, holding that the State's statutory interest comes into being "when a verdict is

returned" by the jury, but before any final judgment is entered. (Pet. App. 5-8). Under Alaska law, the court's adjustment of a punitive damages verdict to conform with the split-recovery statute occurs after trial, but before judgment is issued or any money changes hands. (Pet. App. 5-9). Other adjustments to verdict awards also occur during this time span, such as remittitur proceedings, attorney fee and cost awards, and alterations of verdicts in accordance with statutory damage caps.

This crucial textual difference – not a split in legal reasoning – explains why Alaska's split-recovery statute is constitutional but Colorado's was not. Indeed, when the Alaska Supreme Court first addressed the constitutionality of AS 09.17.020(j) in 2002, it distinguished *Kirk* on exactly that factual basis, explaining that the Colorado court's analysis did not apply in Alaska because under Colorado's statute, "the property interest in the punitive damages award vested *before* the forfeiture was taken by the state." *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1058 (Alaska 2002) (plurality opinion); *see also Anderson v. State ex rel. Central Bering Sea Fisherman's Ass'n*, 78 P.3d 710, 714-16 (Alaska 2003) (plurality opinion). In this case, too, the Alaska Supreme Court distinguished *Kirk* on factual, not legal grounds. (Pet. App. 51-54). Other state courts similarly have determined that *Kirk*'s analysis was unique to the timing of the seizure in Colorado's statute. *See Cheatham v. Pohle*, 789 N.E.2d 467, 472-75 (Ind. 2003); *Fust v.*

Attorney Gen'l of Missouri, 947 S.W.2d 424, 431 (Mo. 1997) (en banc).

The only two split-recovery statutes that have been invalidated under the Takings Clause are those where the forfeiture operated only once judgment was awarded and money changed hands. No court has invalidated as an unconstitutional taking a statute like Alaska's, where the State's interest attaches before final judgment. Because there is no split of legal authority, granting certiorari is not needed to further the uniformity of the law on the federal issue here presented. This court should deny the petition for certiorari.

B. The Alaska Supreme Court's Takings Analysis Was Correct.

Nor is certiorari necessary because an important federal question has been decided in a way that conflicts with this Court's precedent. The Alaska Supreme Court's Takings Clause analysis was correct, and did not conflict with any decisions of this Court.

The Fifth Amendment to the United States Constitution states that "nor shall private property be taken for public use, without just compensation." The Takings Clause applies against Alaska through the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980). But the prohibition only applies to "property."

In addressing Reust's Takings Clause challenge to AS 09.17.020(j), the Alaska Supreme Court determined that a litigant's interest in 100% of a punitive damages award was not "property" within the meaning of the Takings Clause. The court reasoned that Reust could not have any settled expectation in recovering 100% of any punitive damages award because his claim accrued in April 1998, after the effective date of AS 09.17.020(j). After that date, Reust could not have had any reasonable expectation that he would recover more than 50% of any punitive damages awarded by the jury. For this reason, Reust had no settled and reasonable property interest that could have been taken by the State. (Pet. App. 47-49, 51-54; *see also State v. Carpenter*, 171 P.3d 41, 67-70 (Alaska 2007)). This reasoning accords with this Court's decisions. After all, "[t]he hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982). After AS 09.17.020(j) became effective, Reust had no entitlement to more than 50% of any punitive damages award under Alaska law. He had no property that could be taken by the state.

The same argument applies to Reust's claim that he had a property interest in the settlement funds he received from APC in the post-verdict, post-appeal settlement. After the Alaska Supreme Court held that AS 09.17.020(j) was constitutional and applied to Reust and that the State was a proper party to the litigation to protect its interest, Reust had no

reasonable expectation that he was entitled to recover 100% of the punitive damages award. Indeed, the terms of the settlement agreement itself demonstrate that Reust knew he did not have complete ownership of those funds. To the contrary, he specifically recognized that the State had an unresolved claim against him and agreed to pay it. (Pet. App. 77). The agreement makes clear that Reust knew that his claim to the settlement proceeds was not absolute, and that he agreed to enter into the settlement despite his knowledge of this risk. For these reasons, the settlement agreement does not alter the constitutional takings analysis.

The Alaska Court also rejected Reust's takings challenge because any property interest he could have in a punitive damages award had not vested when the State's statutory interest became effective. (Pet. App. 52-54). As discussed in Part A *supra*, any property interest a litigant could have in an award of punitive damages would not vest until final judgment. Since Alaska's statutory interest comes into being before any final judgment is entered, it does not take any property from a litigant.

These holdings are perfectly consistent with the prior decisions of this court. It is well-established that statutory limits on liability and recovery in litigation are permissible, since "a person has no property, no vested interest, in any rule of the common law." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978) (internal quotes omitted). Punitive damages do not compensate plaintiffs for

injury. Instead, they are designed to punish wrongful conduct and deter its repetition. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). As such, state legislatures "necessarily have considerable flexibility in determining the level of punitive damages that they will allow." *BMW of N. America, Inc. v. Gore*, 517 U.S. 559, 568 (1996). Nothing in this court's precedent suggests that State cannot place limits on the recoverable punitive damages in a lawsuit. Because Alaska law permissibly placed limits on Reust's punitive damages recovery, his interest in receiving 100% of the amount that the jury awarded to him was not a property interest cognizable under the Takings Clause.

The Alaska court's federal constitutional analysis was sound. This Court should deny the petition for certiorari.

C. Reust's Due Process Claims Do Not Merit Review.

Reust's due process analysis presents no considerations warranting this court's review. He concedes that his due process claims concern only the application of AS 09.17.020(j) to him personally under the unique fact pattern of his attempted post-verdict, post-appeal settlement. (Pet. 13). Given the personal nature of Reust's claims, there is no federal interest in review here, and he articulates none. Reust disagrees with the Alaska court's conclusion that the word "award" as used in AS 09.17.020(j) applies to

jury verdicts instead of final judgments (Pet. 13-15), but this is not by any stretch of the imagination an important federal issue. Rather, it is an issue of state statutory construction.

Nor does Reust have a viable procedural due process claim. He cites procedural due process cases of this court, including *Fuentes v. Shevin*, 407 U.S. 67 (1972) and *Mathews v. Eldridge*, 424 U.S. 319 (1976), for the proposition that he has been denied due process of law. (Pet. 15-19). These authorities have no bearing here. This court's procedural due process jurisprudence concerns a person's right to notice that he may suffer a loss at the hands of government, and a "meaningful opportunity to present their case" in opposition. *Mathews*, 424 U.S. at 348. As discussed above, Reust did not suffer a loss of property, because he had no property interest in his unreduced punitive damages award. But more fundamentally, there can be no question that he has had notice of the State's claim and ample opportunities to present his case in opposition to AS 09.17.020(j). Well before any judgment was issued against him, Reust asked the court to find AS 09.17.020(j) unconstitutional and was given a chance to brief the issues. (Pet. App. 57-59). He has extensively litigated his case against the split-recovery statute in Alaska's lower courts, as well as twice before Alaska's highest court. Reust has had a meaningful opportunity to present his case. There is no procedural due process violation and no compelling reason for this court to grant certiorari.

CONCLUSION

This case presents no important issues of federal law. Courts are in accord that split-recovery statutes that apply prior to final judgment do not violate the Takings Clause, and this conclusion does not conflict with this Court's decisions. Reust's procedural due process claim similarly lacks both national importance and merit. This Court should deny Reust's petition for certiorari.

Respectfully submitted,

DANIEL S. SULLIVAN
Attorney General
STATE OF ALASKA

JONATHAN WOODMAN
Counsel of Record
Assistant Attorney General

RUTH BOTSTEIN
Assistant Attorney General
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Phone: (907) 269-5190

Counsel for Respondent